Supreme Court, U.S.
FILED
94 488 SEP 6 1994

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN FREDERICK DORMAN,
Petitioner,

v.

EMERSON ELECTRIC COMPANY,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL J. MCMICHAEL
(Counsel of Record for Petitioner)
1400 Elbridge Payne, #220
Chesterfield, Missouri 63017
(314) 532-1400

Of Counsel:
MCMICHAEL & LOGAN

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

Should the Supreme Court formulate a choice of law analysis that would create uniformity and clarity among the states with respect to manufacturers, sellers, importers, exporters, and consumers in both a domestic and particularly an international context?

What factors should be taken into account when determining choice of law between U.S. states and foreign countries, as well as between different U.S. states?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
ARGUMENT	4
CERTIFICATE OF SERVICE	11
APPENDIX	A-1

TABLE OF AUTHORITIES

Page(s)

Cases:

Banco National de Cuba v. Sabbatina, Receiver, et al., 376 U.S. 398 (1964) 9

Birnstill v. Home Savings of America, 707 F.2d 795 (8th Cir. 1990) 5

Cutshall v. Ford Motor Co., 719 F.Supp. 782 (S.D.IN. 1989) 5,6

Deutschman v. Beneficial Corp., 761 F.Supp. 1080 (D.Del. 1990) 4

Erie R. Co. v. Tomkins, 304 U.S. 64 (1938) 4

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 5

Hanley v. Forester, 903 F.2d 1030 (5th Cir. 1990) 5,6

Hensley v. United States, 728 F.Supp. 716 (S.D.Fla. 1989) 5,6

In Re Sabin Oral Polio Vaccine Products Liability Litigation, 774 F.Supp. 952 (D.M.D. 1991) 4

Koster v. (American) Lumbermens Mutual Casualty Co., 330 U.S. 518 (1947) 5

Kozoway v. Massey Ferguson, Inc., 722 F.Supp. 641 (D.Colo. 1989) 7

Miller v. Long-Airdox Co., 914 F.2d 976 (7th Cir. 1990) 4,6

Morris v. SSE, Inc., 912 F.2d 1392 (11th Cir. 1990) 4

Thornton v. Cessna Aircraft Co., 886 F.2d 85 (4th Cir. 1989) 4

Statutes:

28 U.S.C. §1291 1

28 U.S.C. §1332(a)(3) 1,2

Publications:

Black's Law Dictionary 820 (5th ed. 1979) 4

Randall and Norris, *A New Paradigm for International Business Transactions,* 71 Wash. U.L.Q. 599 (1993) 4

Restatement (Second) of Conflicts (1971) 4,5,7

State Department Note 397, July 16, 1969 (To Cuban Ministry of Foreign Relations) 9

U.S. Industrial Outlook, U.S. Department of Commerce (1993) 7

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN FREDERICK DORMAN,
Petitioner,

v.

EMERSON ELECTRIC COMPANY,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JURISDICTIONAL STATEMENT

Original subject matter jurisdiction for the United States District Court Eastern District of Missouri is based on diversity of citizenship under 28 U.S.C. §1332(a)(3).

Appellate jurisdiction for the United States Eighth Circuit Court of Appeals is based on 28 U.S.C. §1291. Entry of Judgment was made by the United States Court of Appeals on May 5, 1994. App. p. 5. Appellant's Petition for Rehearing was denied by the United States Court of Appeals on June 7, 1994. App. p. 20.

Jurisdiction of this Honorable Court is invoked pursuant to Supreme Court Rule 10.1(a).

STATEMENT OF THE CASE

On August 11, 1989, Plaintiff John Frederick Dorman's right arm was nearly severed from his body when the blade disengaged from a 10" Sears/Craftsman Professional miter saw. The accident happened at a work site in Nanaimo, British Columbia. The saw in question was purchased in Canada from Sears Canada, assembled in Taiwan, and design/design-tested in St. Louis, Missouri by Emerson Electric.

This case was originally filed by John Frederick Dorman, a Canadian citizen, against Emerson Electric, a Missouri corporation, in the United States District Court Eastern District of Missouri on July 3, 1991. Federal jurisdiction was based on diversity of citizenship pursuant to 28 U.S.C. §1332(a)(3). The case was submitted on allegations of products liability, strict liability, breach of implied warranty, *res ipsa loquitur,* and negligence. All of these allegations involved defective design and design-testing by Emerson Electric's engineers in St. Louis, Missouri.

On May 18, 1992, Defendant filed its motion to strike portions of Plaintiff's claim on the grounds that Canadian law should apply. On March 24, 1993, the United States District Court granted Defendant's motion to strike and held that Canadian law was applicable. App. p. 1. The Court then summarily dismissed the case outright stating that Canadian law does not recognize products liability, strict liability, breach of implied warranty, and *res ipsa loquitur. Id.* No mention was made as to Plaintiff's remaining negligence claim.

A timely appeal was filed to the United States Eighth Circuit Court of Appeals on April 13, 1993. On May 5, 1994, the Court of Appeals affirmed in part and reversed and remanded in part

the decision by the United States District Court. App. p. 5. The Court of Appeals affirmed the District Court's ruling by utilizing Missouri's choice of law analysis and ruling that Canadian law applies. Plaintiff's claims based on products liability, strict liability, breach of implied warranty, and *res ipsa loquitur* were dismissed by the Court of Appeals. *Id.* The Court of Appeals reinstated Plaintiff 's negligence claim and remanded the case to the District Court for further proceedings. *Id.* Plaintiff's Petition for Rehearing was denied on June 7, 1994. App. p. 20. Plaintiff/ Appellant now petitions this Honorable Court to issue a Writ of Certiorari on the issue of choice of laws as applied in the present case.

Plaintiff/Appellant contends that he and the Defendant Missouri corporation should be entitled to be judged under the law of the place where the wrongful conduct occurred, at the design and design-testing stage in St. Louis, Missouri.

It is Plaintiff /Appellant's position that Missouri's choice of law principles are in direct conflict with other states' choice of law principles. Different states permit different factors to be analyzed when deciding this issue. As a result, there is no standard choice of law analysis common to all the states. This type of uncertainty is not only dangerous for those American companies venturing out into the modern global economy, but is also dangerous for those consumers injured by defective American-designed products and given absolutely no protection by foreign imposed law.

ARGUMENT

This Petition for a Writ of Certiorari is submitted to this Honorable Court on the issue of choice of law involving a corporate defendant from the United States and a citizen of Canada as a plaintiff. The question presented is: under what circumstances should a United States court of law apply foreign law in cases brought before them?

This conflicts issue is one of both topical relevancy and international dispute. Presently, different tests are used by different states in the determination of whether to apply foreign law or the law of the U.S. state where the action is brought. *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938).

Currently, individual U.S. states' conflict of law analyses apply to both interstate and international cases. This makes the need for clarification and uniformity even greater. Randall and Norris, *A New Paradigm for International Business Transactions*, 71 Wash.U.L.Q. 599 (1993). See Restatement (Second) of Conflicts 10 (1971).

A short sampling of various state conflicts laws reveals diversity in tests and results. Alabama, Maryland, and Delaware apply *lex loci delicti,* or the law of the place where the crime or wrong took place. *Morris v. SSE, Inc.*, 912 F.2d 1392 (11th Cir. 1990); *In Re Sabin Oral Polio Vaccine Products Liability Litigation*, 774 F.Supp. 952 (D.M.D. 1991); and *Deutschman v. Beneficial Corp.*, 761 F.Supp. 1080 (D.Del. 1990); Blacks Law Dictionary 820 (5th ed. 1979).

South Carolina also applies *lex loci delicti* except it will not do so if the foreign law is contrary to its settled public policy. *Thornton v. Cessna Aircraft Co.*, 886 F.2d 85 (4th Cir. 1989). Both Illinois and Indiana courts look at where the injury occurred, as well as the place where the conduct causing injury, or "legal action" occurred. *Miller v. Long-Airdox Co.*, 914 F.2d 976

(7th Cir. 1990) and *Cutshall v. Ford Motor Co.*, 719 F.Supp. 782 (S.D.IN. 1989).

New York courts apply the "interest analysis" test and Mississippi law dictates the application of the law of the "place of the tort." *Hensley v. United States*, 728 F.Supp. 716 (S.D.Fla. 1989) and *Hanley v. Forester*, 903 F.2d 1030 (5th Cir. 1990).

In the present case which derives from the United States District Court, Eastern District of the State of Missouri, the Court applied the "most significant relationship test" as enunciated in the Restatement (Second) of Conflicts (1971). *Birnstill v. Home Savings of America*, 707 F.2d 795 (8th Cir. 1990).

All of these tests were created with the goal of establishing clear guidelines for states to follow when deciding upon whose law to apply. The result of each and every state proffering its own conflicts test is that there is confusion and misapplication of these tests both on a domestic and international level.

Plaintiff/Appellant in the present case suggests this is a perfect opportunity for this Court to establish uniformity and clarity with respect to the choice of law doctrine and the confusion that surrounds this doctrine.

Plaintiff/Appellant further suggests that a ruling on this issue would be in line with *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), wherein this Court established a two-step process in determining the issue of forum non-conveniens.

Appellant submits that with the incredible growth of economic markets both at home and abroad, a cogent, uniform test is urgently needed to quell the uncertainty existing among manufacturers, producers, distributors, exporters, importers, and consumers, as to what law will apply after a product is shipped into the international marketplace.

The case at bar presents a perfect example of why a choice of law guideline needs to be established. Plaintiff/Appellant John Dorman, a Canadian citizen, was using an Emerson Electric designed and design-tested, Sears Craftsman miter saw in Canada when the blade flew off the saw and nearly severed his right arm from his body. The saw was purchased in Canada, manufactured in Taiwan, and design and design-tested in St. Louis, Missouri.

Mr. Dorman alleged a design defect[1] in the saw and sued Emerson Electric, the designer of the saw, in the United States District Court, Eastern District of Missouri. Emerson Electric is a Missouri corporation with its main offices located in St. Louis, Missouri.

Both the United States District Court and the United States Eighth Circuit Court of Appeals used Missouri's "most significant relationship" test and found that since the accident happened in Canada, the law of Canada must apply. App. pp. 1 and 5.

However, this is hardly a uniform result. Had the saw been designed and design-tested in Illinois or Indiana and suit filed in one of those venues, the court would have given more deference to the place where the conduct causing the injury occurred and most likely ruled that Illinois or Indiana law applies. See *Miller v. Long-Airdox Co.*, 914 F.2d 976 (7th Cir. 1990) and *Cutshall v. Ford Motor Co.*, 719 F.Supp. 782 (S.D.IN. 1989).

Similarly, had the saw been designed and design-tested in New York or Mississippi, and suit filed in one of those states, the result would most likely be different and that particular state's law would apply. See *Hensley v. United States*, 728 F.Supp. 716 (S.D.Fla. 1989) and *Hanley v. Forester*, 903 F.2d 1030 (5th Cir. 1990).

---

[1] Mr. Dorman has also sued under negligence, *res ipsa loquitur*, and breach of warranty.

In fact, there is not even uniformity among those states using the exact same test. Both Missouri and Colorado utilize the most significant relationship test of the Restatement (Second) of Conflicts (1971). Yet when presented with almost identical cases with almost identical facts, the two courts ruled differently.

In *Kozoway v. Massey Ferguson Inc.*, 722 F.Supp. 641 (D.Colo. 1989), a Canadian citizen was injured in Canada by a hay baler purchased in Canada, but manufactured in Iowa. The Colorado court refused to apply Canadian Law.

Faced with similar facts in the present case, both the District Court and the Eighth Circuit Court of Appeals ruled that Canadian Law should apply. App. pp. 1 and 5.

Plaintiff/Appellant concedes it is improbable that this Court can issue a bright-line rule that will create perfect uniformity in each and every case. However, simply applying the law of the place of the tort is a dangerous precedent to set with the growing international economy and the multitude of various legal systems that exist around the world. Plaintiff/Appellant contends it is in everyone's best interest to have a clear guideline to follow when deciding choice of law issues.

More importantly, the topical relevancy of this issue is monumental. The number of foreign countries opening up their borders and economies to United States investment and trade has increased dramatically in the last five years. As a result, litigation between citizens and businesses of different countries has also increased.

Manufacturers are concentrating more on export opportunities in Asia, Latin America, the countries of the former Soviet Union, and Eastern Europe. U.S. Department of Commerce, *U.S Industrial Outlook*, (1993).

Currently, United States and Japanese industries are the dominant suppliers to the global market with each holding approximately forty percent (40%) of the market. *Id.* at 12. The

United States' share is expected to be boosted by the implementation of the North American Free Trade Agreement (NAFTA). *Id.* at 12.

Leading export destinations for United States products are Canada, Mexico, Saudi Arabia, and South Korea, while European markets such as France, the United Kingdom, and Germany continue to grow. *Id.* at 12. China has recently been reemerging as an export and investment destination for U.S. businesses and Taiwan, Singapore, and Hong Kong remain strong export areas. *Id.* at 12.

As a result of providing products to both traditional and new international consumers, United States companies are finding themselves increasingly exposed to unanticipated liability for physical harm or property damage from alleged defective products.

As a consequence of the increased exposure world-wide, comes the threat of being faced with the application of foreign law. This foreign law might be similar to our system, as in Canada, or it may be contrary to our system of justice. But as the choice of law system stands in the United States right now, American companies and citizens do not know what type of laws they will be up against when they sue for damages in United States courts. This is especially true if the accident happened outside of United States borders.

In the present case, the choice was made to apply Canadian law because the accident occurred in Canada. Little, if no deference, was given to the fact that Mr. Dorman chose to sue Emerson Electric in Emerson's home forum and even less deference was given to the fact that the tortious conduct giving rise to the accident occurred during the designing of the miter saw in St. Louis, Missouri.

As a consequence of this decision, Plaintiff John Dorman, whose right arm was nearly severed as a result of the conduct of a St. Louis, Missouri corporation, has to apply Canadian law.

Because of Canada's interest in protecting and promoting industry within its borders, Canada does not recognize products liability, *res ipsa loquitur,* and breach of warranty. This leaves Plaintiff John Dorman only one cause of action to pursue, negligence, and even this cause of action has caps according to Canadian law.

Is this the type of result we want when an action for damages as a result of a dangerous product is properly brought in the United States against a United States corporation?

Plaintiff/Appellant submits that the decision to apply a foreign country's law simply because the accident occurred there is a dangerous precedent for both aggrieved plaintiffs and defendant American companies.

Would the District Court and Court of Appeals have applied foreign law if this same accident had occurred in one of the newly formed Soviet States where there is no existing case law? Would these Courts have applied foreign law if the accident had occurred in Sarajevo, Yugoslavia, where no one knows what form of government is in power? Would it have applied Cuban law when our State Department has described the Cuban law as "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West"? See State Dept. Note 397, July 16, 1960 (To Cuban Ministry of Foreign Relations) and *Banco National de Cuba v. Sabbatina, Receiver, et* al, 376 U.S. 398 (1964).

Plaintiff/Appellant suggests that the law of the State of Missouri, where the Defendant resides and where the wrongful conduct occurred, would have been applied had the accident occurred in one of the above-mentioned countries.

Canada, whose legal system shares many of the same attributes as the United States, was an easy choice because of the proximity in distance and the familiarity of a similar legal system.

However, a uniform choice of laws ruling must be made to guide both consumers and businesses into the expanding global economy. This choice of laws ruling should be one that applies to all countries involved, not just a convenient neighbor.

It is Plaintiff/Appellant's position that the Restatement's "most significant relationship test" and the *lex loci delicti* test are outdated, leave too much to judicial discretion, and do not meet the needs of the international community, including the United States. Under these choice of law analyses, too much emphasis is placed upon where the tort manifested itself and not enough is placed on the issue of where the actual wrong occurred.

It is in the interest of defendants generally to apply the law of their home forum. That is the place where they and their employee citizens and their similarly situated brother and sister corporations have the best chance to affect the law that governs them. While Emerson may be pleased with the outcome in this particular case, in the long run it is bad policy for the United States and its economic enterprises in general.

Plaintiff requests this Honorable Court establish a test as to what factors are to be analyzed when faced with a choice of laws question like the one at bar. Plaintiff urges this Court to accept this Writ of Certiorari.

Respectfully submitted,

Daniel J. McMichael
(Counsel of Record for Petitioner)
1400 Elbridge Payne, #220
Chesterfield, Missouri 63017
(314) 532-1400

Of Counsel:
McMichael & Logan

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN FREDERICK DORMAN,
Petitioner,

v.

EMERSON ELECTRIC COMPANY,
Respondent.

PROOF OF SERVICE

I hereby certify that three copies of the Petition for Writ of Certiorari were served on Respondent's attorney of record, John B. Kinsella, 1 Mercantile Center, Suite 2900, St. Louis, MO 63101, by regular mail, correctly addressed and postage prepaid, on this 2nd day of September, 1994.

DANIEL J. McMICHAEL
(Counsel of Record for Petitioner)
1400 Elbridge Payne, #220
Chesterfield, Missouri 63017
(314) 532-1400

INDEX TO APPENDIX

Page

APPENDIX A
MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI DATED MARCH 24, 1993 ..... A-1

APPENDIX B
DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED MAY 5, 1994 ..... A-5

APPENDIX C
DENIAL OF PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED JUNE 7, 1994 ..... A-20

APPENDIX D
STATUTES INVOLVED

28 U.S.C. §1291 ..... A-21

28 U.S.C. §1332(a)(3) A-22

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-1363C(6)

JOHN FREDERICK DORMAN,
Plaintiff,

vs.

EMERSON ELECTRIC COMPANY,
Defendant.

ORDER

[Filed: March 24, 1993]

Pursuant to the memorandum filed herein on this date, IT IS HEREBY ORDERED that defendant's motion to strike paragraphs 6-9 of plaintiff's complaint shall be and it is granted.

Accordingly, IT IS FURTHER ORDERED that plaintiff's complaint shall be and it is dismissed.

Dated this 24th day of March, 1993.

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-1363C(6)

JOHN FREDERICK DORMAN,
Plaintiff,

vs.

EMERSON ELECTRIC COMPANY,
Defendant.

MEMORANDUM

[Filed: March 24, 1993]

This matter is before the Court on defendant Emerson Electric Company's (Emerson) motion to strike certain portions of plaintiff's complaint. Plaintiff John Dorman (Dorman), a resident of British Columbia, brings this action to recover for personal injuries sustained while operating a saw designed and manufactured by Emerson. Emerson is a Missouri corporation which retains an agent for service of process in St. Louis. Plaintiff purchased the saw, a 10" Sears/Craftsman Professional miter saw, from a Sears retail outlet in Nanaimo, British Columbia. The incident in which he sustained personal injury occurred in British Columbia.

As a preliminary matter the Court must apply Missouri's choice of law rules to determine whether Canadian or Missouri law will be applied in this case. *Birnstill v. Home Savings of America,* 907 F.2d 795, 797 (8th Cir. 1990). Plaintiff's claims sound in both contract and tort. In order to make choice of law determinations in such actions, Missouri courts apply the significant relationship tests found in the Restatement (Second) of Conflict of Laws (1971). *Id.* Section 146 of the Restatement sets forth the appropriate analysis to be undertaken in resolving

choice of law questions in tort actions: "In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless with respect to the particular issue some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties." *See also Wright v. Minter*, 736 F. Supp. 1024, 1026 (W.D. Mo. 1990). The factors set forth in section 6 include a) the needs of the interstate and international systems, b) the relevant policies of the forum, c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, d) the protection of justified expectations, e) the basic policies underlying the particular field of law, f) certainty, predictability and uniformity of result, and g) ease in the determination and application of the law to be applied. In this case the accident involving the saw and plaintiff's personal injuries occurred in British Columbia. Therefore, pursuant to § 146, Canadian law would apply. None of the factors set forth in section 6 indicates that Missouri has a more significant relationship to the accident than Canada. Accordingly, the Court concludes that Canadian law should apply to all substantive issues in the present case.

With respect to the motion to strike, defendant next asserts that plaintiff's allegations of strict liability in tort found in Paragraphs 6-8 of his complaint must be stricken because there is no cause of action in strict liability under Canadian law. Pursuant to the provisions of the *Canadian Encyclopedic Digest* (Western 3d), relevant portions of which were provided to the Court by defendant, the Court concludes that plaintiff's claims based upon strict liability in tort must fail as a matter of law. *Canadian Encyclopedic Digest* (Western 3d), *Negligence* § 298.1.

Defendant further contends that plaintiff's claim for breach of implied warranty premised upon Mo. Rev. Stat § 400.2-314 (1986) must fail because Missouri substantive law is not applicable to plaintiff's claims. The Court agrees and will therefore strike paragraph 8 of plaintiff's complaint.

Finally, defendant asserts that the allegations of *res ipsa loquitur* found in paragraph 9 of plaintiff's complaint should be stricken because under Canadian law *res ipsa loquitur* is not applicable unless the injury complained of is unexplained and the instrumentality responsible for causing the injury was under the sole control of the defendant. *Canadian Encyclopedic Digest* (Western 3d) *Negligence* § 467. Relying on Missouri substantive law, plaintiff asserts that *res ipsa loquitur* is applicable because the saw was under the sole control of the defendant at the time that the design defect occurred. Plaintiff has offered no authority under Canadian law for its assertion that the relevant time to measure defendant's control of the instrumentality is when the negligence or the design defect occurred rather than when the plaintiff sustained injury. In addition, where, as here, the plaintiff had control over the instrumentality at the time that he sustained injury, Missouri courts have rejected claims predicated upon *res ipsa loquitur*. *See Mahan v. Missouri Pac. R.R.*, 760 S.W.2d 510-513, 514 (Mo. App. 1988); *See also Randolph v. Collectramatic. Inc.*. 590 F.2d 844, 849 (10th Cir. 1979). For these reasons, the Court concludes that plaintiff's allegations premised upon *res ipsa loquitur* should be stricken.

Dated this 24th day of March, 1993.

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2222

John Frederick Dorman,
Appellant,

vs.

Emerson Electric Company,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part, reversed in part, and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

May 5, 1994

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

MANDATE ISSUED 6/14/94

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2222

John Frederick Dorman,
Appellant,

vs.

Emerson Electric Company,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: December 15, 1993

Filed: May 5, 1994

Before McMILLIAN, FAGG, and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

John Frederick Dorman, a Canadian citizen, brought this diversity action against Emerson Electric Company (Emerson), a Missouri corporation, to recover for personal injuries he sustained while operating a saw designed by Emerson. Dorman's cause of action proceeded upon theories of strict products liability, breach of warranty, negligence, and res ipsa loquitur. Pursuant to Federal Rule of Civil Procedure 12(f), Emerson moved to strike the claims based on strict liability, breach of warranty, and res ipsa loquitur. The District Court, applying Missouri choice-of-law rules, held that Canadian law applies to the claims, granted Emerson's motion to strike, and dismissed the entire complaint. Dorman appeals the District Court's choice-of-law conclusions and the granting of the motion to strike. He also argues that the District Court abused its discretion in

dismissing his negligence claim. We affirm in part and reverse and remand in part.[1]

I.

Dorman is a resident of Lantzville, British Columbia, Canada. In 1989 he purchased a ten-inch Sears/Craftsman Professional miter saw from a Sears Canada, Inc., retail outlet in Nanaimo, British Columbia, to use on various projects he had been hired to perform. Shortly after purchasing the saw, Dorman removed the upper and lower guards on the saw and reattached the blade so that he could make a deeper cut with the saw. When Dorman then turned the saw on, the rotating blade disengaged at a very high speed and struck and almost completely severed his arm below the shoulder. The arm was surgically reattached, but Dorman has only limited use of it.

In July 1991 Dorman brought this action against Emerson in the Eastern District of Missouri. Emerson admits it designed and design-tested in St. Louis the kind of saw that injured Dorman. The particular saw that injured Dorman was manufactured in Taiwan by P & F, Inc., a Taiwanese corporation, and was quality-control tested in Taiwan by both P & F, Inc., and Emerson. The saw then was purchased by Emerson Electric Canada, Ltd. (EECL), a Canadian corporation, and was shipped directly from Taiwan to Vancouver, Canada, where EECL sold the saw to Sears Canada, from which Dorman purchased the saw.

After the District Court denied Emerson's motion to dismiss on the grounds of forum non conveniens, Emerson filed its

[1] While this appeal was pending Emerson filed a motion to strike pages one through fifty of Dorman's supplemental appendix, which consist of the deposition of John Dorman taken subsequent to the District Court's dismissal of his complaint. In his response, Dorman acknowledges that this deposition falls outside of the record on appeal and submits, and seeks permission to file, an amended statement of facts based on materials that are properly part of the record. We grant Emerson's motion to strike and accept for filing Dorman's amended statement of facts.

motion to strike pursuant to Federal Rule of Civil Procedure 12(f)[2]. Emerson argued that the District Court should apply Missouri's choice-of-law rules and that for both tort and contract actions Missouri courts apply the most-significant-relationship test found in the Restatement (Second) of Conflict of Laws § 145 (1971) (the Restatement). Under this analysis, Emerson argued that Canadian law governs the disposition of the case and that Dorman's claims based upon strict products liability, breach of warranty, and res ipsa loquitur were materially deficient as a matter of Canadian law and should be stricken. Emerson recognized that Dorman's negligence claim is cognizable under Canadian law and did not move to strike it.

The District Court granted Emerson's motion to strike, concluding that, under Missouri's choice-of-law rules, Canadian law is the appropriate law to apply to this case and that the challenged claims are materially deficient under Canadian law. Without discussing Dorman's negligence claim, the court dismissed Dorman's entire complaint.

On appeal, Dorman argues that the District Court erred in determining that Canadian law, rather than Missouri law, governs the case. Alternatively, he contends that if Canadian law does apply, the court erroneously concluded that his claims are materially deficient under Canadian law. Finally, Dorman argues that the court abused its discretion when it dismissed his negligence claim. We affirm the District Court's conclusions that Canadian law is the appropriate law to apply to this case and that under Canadian law Dorman's claims of strict products liability, breach of warranty, and res ipsa loquitur are materially

---

[2] Under Federal Rule of Civil Procedure 12(f), a court may strike from any pleading "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The motion made by Emerson more appropriately would have been labeled a motion under Rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted. The District Court made nothing of the misdesignation of the motion and neither do we.

deficient. We reverse the District Court's dismissal of Dorman's negligence claim, however, and remand for further proceedings on that claim.

II.

A.

Dorman argues that the District Court erred when it concluded that Canadian law rather than Missouri law governs his cause of action. A district court, sitting in diversity, must follow the choice-of-law approach prevailing in the state in which it sits. *Birnstill v. Home Sav. of Am.*, 907 F.2d 795, 797 (8th Cir. 1990). The District Court correctly recognized that Missouri choice-of-law rules must be used to decide whether Canadian or Missouri substantive law governs Dorman's action. For both tort and contract claims, Missouri courts apply the most-significant-relationship test as defined in the Restatement. *Galvin v. McGilley Memorial Chapels*, 746 S.W.2d 588, 590 (Mo. Ct. App. 1987). Under this test, the identity of the state having the most significant relationship will depend upon the nature of the cause of action and upon the particular legal issue in dispute. Whether the District Court's analysis under the forum state's choice-of-law rules was proper is a legal issue subject to de novo review. *Birnstill*, 907 F.2d at 797.

Section 145 of the Restatement establishes the general rule applicable to all torts: the rights and liabilities of the parties will be determined by the law of the state with the most significant relationship to the accident and the parties. Section 146 of the Restatement establishes the precise rule with respect to conflicts issues arising out of personal injury actions:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship

under the principles stated in § 6[3] to the occurrence and the parties, in which event the local law of the other state will be applied.

This formulation essentially establishes a presumption that the state with the most significant relationship is the state where the injury occurred, absent an overriding interest of another state based on the factors articulated in section 6. In ascertaining whether such an overriding interest exists, the section 6 factors must be evaluated taking into account the contacts listed in section 145 according to their relative importance to the particular issue:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil [sic], residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

Kennedy v. Dixon, 439 S.W.2d 173, 181 (Mo. 1969) (en banc) (quoting Restatement § 145(2)).

---

[3] Section 6 articulates the following factors to be considered when determining the proper choice of law:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability, and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement § 6.

In cases in which the injury and the conduct causing the injury occur in the same state, the Restatement principles are easy to apply. *See* Restatement § 146 cmt. d (noting that, subject only to rare exceptions, the local law of the state where the conduct and the injury occurred will be applied). The choice of law becomes more complex, however, where the injury and the conduct causing the injury take place in separate states. Missouri law establishes that where it is difficult to see clearly that a particular state has the most significant relationship to an issue, the trial court should apply the *lex loci delicti* rule; that is, it should apply the substantive law of the place where the injury occurred. *Kennedy*, 439 S.W.2d at 185. This rule, however, should not be used by the courts as a means of abdicating their responsibility to determine which state has the most significant contacts. *Id.* With these Missouri choice-of-law rules in mind, we turn to our consideration of whether the substantive law of Canada or Missouri governs Dorman's case.

B.

Consistent with Missouri's adoption of the Restatement principles, we begin our analysis with the presumption created by section 146 in favor of applying the law of the jurisdiction in which the injury occurred. In this case, the section 146 formulation translates into a presumption in favor of applying the law of Canada, the place where Dorman's injury occurred. Section 146 specifies that the presumption may be rebutted, however, if, as demonstrated by the principles enunciated in section 6 in light of the contacts listed in section 145, another state has a more significant relationship to the accident and the parties with respect to the particular issue in dispute. Under Missouri law, it is not the number of contacts with a particular state that is crucial to the analysis but the quality of these contacts. *Nelson v. Hall*, 684 S.W.2d 350, 359 (Mo. Ct. App. 1984).

A detailed analysis of all of the section 6 factors is unwarranted. The Restatement commentary explains that paragraphs

(d) and (f), which deal with protection of justified expectations and certainty, predictability, and uniformity of result, are implicated only minimally where personal injury claims arising from accidents are involved. This is true because persons who unintentionally cause injury usually act without contemplating the law that may be applied to determine the legal consequences of their conduct. Restatement § 145 cmt b. Similarly, paragraph (a), which lists for consideration the needs of the interstate and international systems, is not ordinarily implicated by actions to recover for personal injuries, *see Kenna v. So-Fro Fabrics Inc.*, No. 93-1192, slip op. at 6 (8th Cir. Mar. 14, 1994), and does not appear to be implicated by Dorman's action. Consideration of ease in the determination and application of the law to be applied, paragraph (g), yields no discernible advantage to Missouri law over Canadian law in this case. Looking to the remaining section 6 factors, paragraphs (b), (c), and (e), dealing with the policies and interests of the jurisdictions involved and the field of law to be applied, we are unable to conclude that Missouri's relationship to the case is so pivotal as to overcome the presumption that Canada, as the state where the injury occurred, is the state with the most significant relationship.

In his attempt to overcome the section 146 presumption in favor of Canadian law, Dorman essentially makes three arguments. First, he contends that Missouri's interest is dominant because the particular issue in dispute in this case is whether Emerson negligently or defectively designed the saw, so that special significance must be given the fact that the alleged cause of the injury, the negligent or defective design of the saw, took place in St. Louis. In essence, he argues that because the kind of saw that injured Dorman was designed and design-tested in St. Louis, Missouri has a more significant relationship to the accident than does Canada.

We find this argument unpersuasive. Although the saw's having been designed in St. Louis is not without significance to

the choice-of-law analysis, we do not believe that this fact, without more, is sufficient to overcome the section 146 presumption in favor of applying the law of the place where the injury occurred. Indeed, to accept Dorman's argument would render the section 146 presumption meaningless in virtually every products liability case, even though section 146 is devoid of language that would suggest an intent to exclude products liability cases from the scope of the presumption. Accordingly, we conclude that we must evaluate the factors set out in sections 6 and 145 without the exaggerated emphasis that Dorman seeks to put on St. Louis as the place where the saw was designed and tested.[4]

Second, Dorman argues that Missouri law should control because Missouri, as the state where the alleged harmful conduct occurred, has "a significant interest in deterring wrongful conduct by one of its corporate citizens." Appellant's Brief at 20. However, the Missouri law of products liability that Dorman requests this Court to apply, while of course concerned with deterring wrongful conduct, is even more concerned with compensating injured victims and protecting the expectation interests of the victim. *Asaro v. Cardinal Glennon Mem. Hosp.*, 799 S.W.2d 595, 599 (Mo. 1990) (en banc); *see generally* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 1 at 5-6, § 2 at 7, § 4 at 26 (5th ed. 1984); John W. Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C.*, 48 Mo. L. Rev. 1, 7 (1983). In *Dunaway v. Fellous*, 842

---

[4] We also observe that, although Dorman's motions to the District Court and his briefs on appeal focus on the allegations of negligent or defective design, his complaint alleges that Emerson "was negligent in designing, manufacturing and selling" the saw. Appendix for Appellant at 5. The saw that injured Dorman was manufactured in Taiwan and delivered to and sold in Canada without ever entering the United States, providing yet another reason to assign no additional significance to St. Louis as the place where the injury-causing conduct allegedly occurred.

S.W.2d 166 (Mo. Ct. App. 1992), upon which Dorman places considerable reliance, the court had before it a Missouri statute immunizing dram shops from liability for accidents involving intoxicated customers. In that case, a customer of the defendant had consumed intoxicating beverages at the defendant's drinking establishment in Missouri and then had driven into Illinois where he negligently caused an accident that injured the plaintiffs. The Missouri Court of Appeals was called upon to decide whether Illinois or Missouri law would control the issue of dram shop liability. The court applied the Missouri statute, concluding that Missouri's public policy would be severely impaired if resident tavern owners no longer could rely on the protection granted to them by the state legislature. *Id.* at 169. Therefore, while in *Dunaway* a compelling public policy required the court to apply Missouri law, Missouri's interest in ensuring that its citizens are compensated for loss is not implicated in this case where a Canadian citizen brings suit for an injury that occurred in Canada. *See Acapolon Corp. v. Ralston Purina Co.*, 827 S.W.2d 189, 194 (Mo. 1992) (en banc) ("Missouri's interest in assuring that its corporations comply with adequate design standards when designing products for manufacture and use abroad is less substantial than the foreign nation's interest in protecting its citizens from injury and setting standards for the manufacture and distribution of products within its borders.").

Third, Dorman argues that Canada has no interest in this litigation because the occurrence of the accident there was merely fortuitous, and thus Missouri's interests are paramount in the section 6 evaluation. As support for this proposition he relies upon the Restatement commentary and *Kozoway v. Massey-Ferguson Inc.*, 722 F. Supp. 641 (D. Colo. 1989). The Restatement commentary advises that the place of the injury is unimportant to the selection of the applicable state law if it is fortuitous in that it bears little relation to the occurrence and the parties. Restatement § 145 cmt. e. The quintessential example of a contact being fortuitous is the "flyover" case where the plaintiff

is injured while passing over a state during air flight, so that the place of the injury is inconsequential. *See Nelson*, 684 S.W.2d at 352 n.3; *see also Jaurequi v. John Deere Co.*, 986 F.2d 170, 175 (7th Cir. 1993). Such is not the case here. To the contrary, the place of Dorman's injury bears a strong relationship to the occurrence and the parties, as it is the place where Dorman purchased the saw, the place where he used the saw, and his domicile.

Neither are we persuaded that the place of the injury is simply fortuitous by *Kozoway*, a federal trial court's interpretation of Colorado choice-of-law principles. In *Kozoway*, 722 F. Supp. at 642, a Canadian citizen brought suit in federal court in Colorado against a Maryland corporation and an Iowa corporation, both with their principal places of business in Iowa. Basing his suit on products liability claims, the plaintiff sought to recover for personal injuries that occurred in Canada but allegedly were caused by a product manufactured in Iowa. The court concluded that under Colorado choice-of-law principles the occurrence of the accident in Canada was merely fortuitous, that all the allegedly wrongful conduct took place in Iowa, and that Iowa law should govern. *Id.* at 643. While Colorado and Missouri both have adopted the most-significant-relationship approach, we find no indication that the Missouri courts would follow the *Kozoway* analysis, and we decline to apply it here.

We conclude that Canada's interests in and contacts with this case are at least as substantial as Missouri's. Accordingly, the presumption established in section 146 in favor of applying the law of the jurisdiction where the injury occurred has not been overcome, and the District Court therefore was correct in holding that the case is governed by Canadian law.

III.

Alternatively, Dorman argues that, even if Canadian law governs the disposition of his case, the District Court erred in

concluding that Canada does not recognize a cause of action sounding in strict products liability and that the rule of res ipsa loquitur is inapplicable under the facts alleged in Dorman's complaint.[5] We review de novo the District Court's interpretations of Canadian law. *Banco de Credito Indus. S.A. v. Tesoreria Gen. de la Sequridad Social de Espana*, 990 F.2d 827, 832-33 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 877 (1994); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir.), *cert. denied*, 113 S. Ct. 454 (1992).

A.

The Canadian courts have held unequivocally that Canadian law does not make available to plaintiffs a theory of strict products liability. *Meisel v. Tolko Indus. Ltd.*, 105 B.C.J. 162, 169 (B.C. S. Ct. 1991) (unpublished) (quoting *Phillips v. Ford Motor Co. of Canada*, 18 D.L.R.(3d) 641, 657 (Ont. Ct. App. 1971) (Schroeder, J.A., concurring) ("[O]ur Courts do not, in product liability cases, impose upon manufacturers, distributors or repairers, as is done in some of the States of the American union, what is virtually strict liability.")). Based on the suggestions of several commentators, Dorman argues that, although in theory the Canadian courts have not endorsed a comprehensive principle of strict products liability, the Canadian courts in fact are imposing strict liability on manufacturers. However, the primary source cited by Dorman recognizes that a theory of strict products liability is not cognizable under Canadian law. S.M. Waddems, Products Liability 131 (2d ed. 1980). More importantly, the Canadian courts have spoken decisively to this issue. We conclude that the District Court correctly determined that Canada does not recognize a cause of action sounding in strict products liability.

---

[5] Dorman's complaint alleged breach of warranty only under the Missouri provisions of the Uniform Commercial Code and not under Canadian law. Accordingly, he does not challenge the District Court's dismissal of his breach of warranty claim as a matter of Canadian law.

B.

Res ipsa loquitur as interpreted by the Canadian courts is quite similar to the American version. Although commonly referred to as a separate doctrine, in reality it simply describes the situation where circumstantial evidence is used to infer the defendant's negligence. *Phillips*, 18 D.L.R.(3d) at 657. "The foundation of the plaintiff's action must be negligence, and where [res ipsa loquitur] is applicable . . . . it merely operates to justify the tribunal of fact inferring negligence on the part of the defendant from the proven circumstances . . . ." 1 G.H.L. Fridman, Q.C., The Law of Torts in Canada 309-10 (1989). To employ res ipsa loquitur the plaintiff must prove that (1) the object that caused the injury was in the sole control and management of the defendant and that (2) the cause of the accident is unknown and the inference of negligence is apparent from the nature of the accident. *Elfassy v. Sylben Invs. Ltd.*, 91 D.L.R.(3d) 96, 99 (Ont. High Ct. J. 1978); *Phillips*, 18 D.L.R.(3d) at 658 (Schroeder, J.A., concurring); *Guerard Furniture Co. v. Horton*, 90 D.L.R.(3d) 379, 387 (B.C. Yale County Ct. 1978).

Dorman has failed to meet this standard. The saw was in his sole control and management when the accident occurred. Moreover, the cause of the accident is known. Dorman's injury occurred when he removed the guards from the saw and the blade disengaged. His entire case is directed at proving that the blade disengaged because Emerson negligently or defectively designed and manufactured the saw. These are not the sort of facts about which it can be said that the "thing speaks for itself." Res ipsa loquitur is reserved for those situations in which an accident or injury has occurred, no one can explain why it has occurred, and yet it is reasonable to infer that the accident would not have occurred in the ordinary course of things if the defendant had exercised proper care. *See* 25 *Canadian Encyclopedic Digest* § 468 (West. 3d ed. 1991); Fridman, *supra*, at 313-14. The cases of the mouse in the sealed bottle of Coca-Cola and the snail in the

corked bottle of ginger beer are cited by Canadian authorities as cases that state facts to which res ipsa loquitur properly applies. *See. e.q.*, *Phillips*, 18 D.L.R.(3d) at 660. In contrast, in *Elfassy*, 91 D.L.R. (3d) at 97, 99, the plaintiff's injury occurred because a fire in the plaintiff's building caused a sprinkler system to be activated, which in turn caused the plaintiff's business to be flooded. As the cause of the accident was known, res ipsa loquitur was inapplicable. Dorman alleges facts that, like those in *Elfassy*, do not support application of the res ipsa loquitur inference of negligence.

Based on our de novo analysis of Canadian law, we conclude that the District Court properly dismissed Dorman's causes of action based on strict liability and res ipsa loquitur.

IV.

Finally, Dorman argues that, even if Canadian law properly applies and the previously mentioned claims fail, the District Court abused its discretion in dismissing his complaint in its entirety. During the oral argument of this appeal, counsel for Emerson conceded that Emerson's motion to strike did not challenge Dorman's negligence claim. Instead, the motion acknowledged that the negligence claim is cognizable under Canadian law. Moreover, in its memorandum opinion, the District Court discussed only those claims challenged by Emerson. We thus conclude that the dismissal of Dorman's negligence claim was an inadvertent error, and we reinstate that claim.

The judgment of the District Court is affirmed insofar as it dismisses Dorman's claims based on strict liability, breach of warranty, and res ipsa loquitur. The judgment is reversed insofar as it dismisses his negligence claim. The negligence claim is reinstated and the case is remanded to the District Court for further proceedings.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2222

John Frederick Dorman,
Appellant,

vs.

Emerson Electric Company,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

The petition for rehearing by the panel is denied.

June 7, 1994

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV — JURISDICTION AND VENUE
CHAPTER 83 — COURTS OF APPEALS
SEC. 1291. FINAL DECISIONS OF DISTRICT COURTS

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(As amended Oct. 31, 1951, c 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-608. § 12(e), 72 Stat. 348; Apr. 2, 1982, Pub.L. 97-164. Title I, § 124, 96 Stat. 36.)

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 85—DISTRICT COURTS; JURISDICTION

Current through P.L. 103-219, approved 3-9-94

Sec. 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

Supreme Court, U.S.
FILED
OCT 5 1994
OFFICE OF THE CLERK

No. 94-488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN FREDERICK DORMAN,
Petitioner,

v.

EMERSON ELECTRIC COMPANY,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH R. HEINEMAN
(Counsel of Record for Respondent)
BRUCE D. RYDER
One Mercantile Center
Suite 2900
St. Louis, Missouri 63101
(314) 621-8575

Of Counsel:
COBURN & CROFT

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THE PETITION SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED FOR REVIEW WERE NOT RAISED BELOW	3
II. THE PETITION SHOULD BE DENIED BECAUSE THIS COURT LACKS THE POWER TO IMPOSE A FEDERAL CHOICE-OF-LAW RULE IN DIVERSITY ACTIONS	4

TABLE OF AUTHORITIES

Page(s)

Cases:

Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975) 6

Dorman v. Emerson Electric Co., 815 F. Supp. 1287 (E.D. Mo. 1993) 3

Dorman v. Emerson Electric Co., 23 F.3d 1354 (8th Cir. 1994) 3

EEOC v. Federal Labor Relations Authority, 476 U.S. 19 (1986) 3

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 4-5,6

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941) 5-6

Rogers v. Lodge, 458 U.S. 613 (1982) 4

Statutes:

28 U.S.C. § 1332(a)(2) 3

Section 400.2-314, R.S.Mo. (1986) 3

No. 94-488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN FREDERICK DORMAN,
Petitioner,

v.

EMERSON ELECTRIC COMPANY,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

This Court should deny the Petition for Writ of Certiorari in this case because the issue it presents, whether this Court should formulate and impose a uniform federal choice-of-law rule, was not raised in the Court of Appeals. Furthermore, the position argued by Petitioner was rejected by this Court more than fifty years ago, on the grounds that this Court lacks the power to create rules of federal common law to replace the rules of general common law formulated by the courts of the several states.

ARGUMENT

This case involves a personal injury claim by Petitioner John Frederick Dorman ("Dorman"), a citizen of Canada, against Respondent Emerson Electric Company ("Emerson"), a Missouri corporation with its principal place of business in Missouri.[1] Dorman alleged that he was injured in British Columbia, Canada while using a power miter saw designed by Emerson. Dorman filed an action against Emerson in the United States

---

[1] Emerson has no parent companies. Its nonwholly owned subsidiaries are: Aichi-Emerson Electric Co.; Astec (BSR) PLC; Controles Electromecanicos De Mexico; Digital Appliance Controls Korea, Inc.; Asco India Limited; Ascomatica S.A. de C.V.; Branson Korea Co., Inc.; Ohkura-Rosemount Co., Ltd.; Rosemount Holding AG; Rosemount AG; Rosemount A/S; Rosemount (India) Limited; Rosemount Instruments Malaysia SDN BHD; Rosemount Instruments Pty. Ltd.; Rosemount Instruments Ltd.; Rosemount S.A.R.L.; Rosemount Portugal S.A.; Rosemount Shanghai Co. Limited; Valmet-Rosemount Inc.; Xomox (India) Limited; Emerson Empreendimentos E Participacoes Ltd. (EEPL); Dinatorque S.A. de C.V.; Emerson Electric (U.K.) Limited; Hocking Holdings Ltd.; Hocking NDT Limited; Nippon Hocking; AB Robotics Ltd.; Copeland Fluid Power Ltd.; Irish Pneumatic Services Ltd.; Leroy-Somer S.A.; Bertrand-Polico S.A.; Atelier de Bobinage de Moteurs Electriques S.a.r.L; Construction Electriques du Nord S.A.; Lorraine Services Electrique Electronique Electromecanique S.A.R.L.; M.I.S. Kerebel Provence S.A.R.L.; Marcel Oury S.a.r.L.; Navarre Services S.A.R.L.; Ouest Electro Service S.A.R.L.; Radiel Bobinage S.A.R.L.; Societe Peaucelle D'Installations et Reparations Electriques S.A.R.L.; Leroy-Somer Burban Argentina S.A.; Leroy-Somer Maroc S.A.; Societe Anonyme de Mecanique et D'outillage du Vivarais S.A.; Societe Con Folentaise de Metalurgie S.A.; Societe de Mecanique et D'Electromthermie des Pays de L'Adour S.A.; Societe Commerciale des Ateliers de Constructions Electriques D'Orleans S.A.R.L.; Shanghai Branson Co. Limited; Ferco S.A; Fisher Controls A.G.; Tianjin Fisher Valve Co. Ltd.; Nippon Fisher Company Ltd.; Oval Engineering Co. Ltd.; Precision Connector Designs, Inc.; Krautkramer Japan Ltd.; Motorvenca - Emerson Motors, CA (VENEMCA); Samsung-Emerson Electric Co. Ltd. (SEECO); Swequipos, S A.; Componentes Avanzados de Mexico, S.A. de C.V.; Transmisiones de Potencia Emerson S.A. de C.V.; Tsubakimoto Emerson Co.; Vermont American Corporation.

District Court for the Eastern District of Missouri, basing jurisdiction on diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(2). The district court, applying Missouri choice-of-law rules, held that Canadian law applied and dismissed Dorman's claims based on breach of warranty premised on Section 400.2-314, R.S.Mo. (1986), strict products liability, and *res ipsa loquitur*. *Dorman v. Emerson Electric Co.*, 815 F. Supp. 1287 (E.D. Mo. 1993). The United States Court of Appeals, Eighth Circuit, affirmed that decision, while reversing the district court's inadvertent dismissal of Dorman's negligence claim. *Dorman v. Emerson Electric Co.*, 23 F.3d 1354 (8th Cir. 1994).

Dorman has now petitioned this Court for a writ of certiorari. Dorman does not claim that the courts below incorrectly applied Missouri choice-of-law rules, nor that the courts below misapplied Canadian law. Instead, he argues for the first time that the district court should have applied a federal choice-of-law rule that would have required this case to be decided under Missouri substantive law. For the reasons stated below, this argument should be rejected, and Dorman's petition should be denied.

I. THE PETITION SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED FOR REVIEW WERE NOT RAISED BELOW.

Dorman presents for review by this Court the question of whether this Court should formulate a uniform choice-of-law analysis among the states. Petition for Writ of Certiorari at i. Dorman, however, never raised this issue in either of the courts below. Indeed, in his brief in the Eighth Circuit, Dorman began his argument by stating: "When determining whether Canadian or Missouri law should apply, the Court must apply Missouri's choice of law rules." Appellant's Brief at 15.

This Court's normal practice is to refrain from addressing issues not raised in the Court of Appeals. *See, e.g., EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986);

Rogers v. Lodge, 458 U.S. 613, 628 n.10 (1982). Dorman has shown no reason why this practice should not be followed in this case. It is improper to ask this Court to adopt a rule with such far-reaching implications as a uniform federal choice of law rule without having developed the arguments for and against such a rule in the lower courts. This is particularly true when, as here, the rule Dorman asks this Court to adopt is contrary to clear precedent established by this Court more than fifty years ago. This Court should deny the Petition for Writ of Certiorari.

II. THE PETITION SHOULD BE DENIED BECAUSE THIS COURT LACKS THE POWER TO IMPOSE A FEDERAL CHOICE-OF-LAW RULE IN DIVERSITY ACTIONS.

Currently, each state formulates its own choice-of-law rules, and federal district courts must apply the choice-of-law rules of the state in which they sit. Dorman asks this Court to change the present system, arguing that it results in confusion and uncertainty for companies and individuals operating in the international marketplace. Dorman's unusual solicitude for companies such as Emerson masks his dissatisfaction with the fact that Missouri choice-of-law rules require the application of Canadian law to his claims against Emerson. In any event, this Court lacks the power to grant the relief Dorman seeks in his Petition, the creation of a uniform federal choice-of-law rule.

The basis for the current system of determining choice of law in diversity cases in federal courts is *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). In that case, this Court unequivocally rejected the idea that federal courts could develop a federal general common law in diversity cases that was different from the state law that would otherwise be applicable.

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be

> declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78.

The principles of *Erie* were applied to choice-of-law issues in *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). In that case, a federal district court sitting in Delaware decided to apply a New York statute in a diversity case pending before it. The court of appeals affirmed, based on that court's independent determination of the applicable law without regard to Delaware law. This Court reversed and remanded the decision for determination of the choice-of-law issue under Delaware law.

> We are of opinion that the prohibition declared in *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. *See Erie Railroad v. Tompkins*, supra, 304 U.S. at 74-77, 58 S.Ct. at 820-822, 82 L.Ed. 1188, 114 A.L.R. 1487. Any other ruling would do violence to the principle of uniformity within a state upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which

> leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. Cf. *Milwaukee County v. White Co.*, 296 U.S. 268, 272, 56 S.Ct. 229, 231, 80 L.Ed. 220. This Court's views are not the decisive factor in determining the applicable conflicts rule. Cf. *Funkhouser v. J. B. Preston Co.*, 290 U.S. 163, 54 S.Ct. 134, 78 L.Ed. 243.

313 U.S. at 496-97. This holding clearly precludes this Court from granting the relief sought by Dorman.

This Court reaffirmed the holding of *Klaxon* in *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975). That case involved a claim for damages for death and personal injury arising out of an explosion in Cambodia. The district court, sitting in Texas, applied Texas substantive law and entered a judgment for the plaintiffs. The court of appeals affirmed. It declined to apply Texas choice-of-law rules, acknowledging that if it did so the substantive law of Cambodia would control some or all of the claims. This Court vacated the court of appeals judgment, holding: "A federal court in a diversity case is not free to engraft onto [state choice-of-law] rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." 423 U.S. at 4.

These cases demonstrate that the relief sought by Dorman here is simply not available. The principles of federalism recognized and applied in *Erie*, *Klaxon*, and *Day & Zimmermann* do not permit this Court to establish different choice-of-law rules

than those correctly applied by the district court and the court of appeals below. This Court should deny the Petition for Writ of Certiorari.

CONCLUSION

Based on the arguments and authorities set forth above, Respondent Emerson Electric Company respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Kenneth R. Heineman
(Counsel of Record for Respondent)
Bruce D. Ryder
One Mercantile Center
Suite 2900
St. Louis, Missouri 63101
(314) 621-8575

OF COUNSEL:
COBURN & CROFT